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DAVIDSON, DAVIDSON
& KAPPEL, LLC
485 SEVENTH AVENUE/14TH FLOOR
NEW YORK NY 10018

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DEC 22 2003

OFFICE OF PETITIONS

In re Application of: :
Frank :
Filed: 26 October, 2000 : ON PETITION
Application No. 09/696,812 :
Docket No.: 600.1095 :

This is a decision on the petition filed herein on 11 September, 2003, under 37 C.F.R. §1.137(b) to revive the above-identified application as abandoned due to unintentional delay.

For the reasons set forth below, the petition is **GRANTED**, and as authorized fees (petition \$1,300.00), extension of time (\$\$410.00) and Notice of Appeal (\$320.00) are charged to Deposit Account 50-0552.

BACKGROUND

A review of the record reveals:

- Petitioner failed to respond timely and properly to the final Office action mailed on 26 August, 2002, with reply due (absent extension of time) on or before 26 November, 2002;
- over a 22 November, 2002, certificate of mail (on the transmittal form) Petitioner filed an after-final amendment (see: 37 C.F.R. §1.116) on 29 November, 2002--however, the Examiner deemed the amendment not a proper reply¹ to the final Office action, refused to enter it, and mailed an Advisory Action on 19 December, 2002, so notifying Petitioner;
- the instant application went abandoned after midnight 26 November, 2002;

¹ The proper response to the final Office action (see: Fn. 1, item (1); MPEP 711.03(c)) must be in the form of: (a) an amendment *prima facie* placing the application in condition for allowance; (b) a Notice of Appeal; or (c) a Continuing Application or Request for Continued Examination (RCE) (with fee and submission) under 37 C.F.R. §1.114.

- no Notice of Abandonment was mailed before the original petition was filed on 30 May, 2003, and that petition to revive under 37(b)37 C.F.R. §1.137(a), and due to the allegations of timely filing also treated under 37 C.F.R. §1.181 as a request to withdraw the holding of abandonment, and the petition(s) were dismissed on 9 July, 2003;
- therein, Petitioner:
 - filed on 30 May, 2003, *inter alia*, copies of: (a) a Notice of Appeal, (b) a check in the amount of \$730.00 in payment for the Notice of Appeal and a two- (2-) month extension of time and (2) an unstamped receipt card (see: MPEP §503); and
 - alleged that the foregoing items had been submitted over a 24 January, 2003, certificate of mailing, and, thus, he timely and properly replied to the 26 August, 2002, final Office action;
 - but Petitioner submitted no copies of docket records, file jacket covers, mail logs or like documents in support of the allegation of timely filing or unavoidable delay;
- with the instant petition, Petitioner satisfies the "fee," "reply" (Notice of Appeal and fee) and "statement" requirements of a petition treated under 37 C.F.R. §1.137(b).

STATUTES, REGULATIONS AND ANALYSIS

Congress has authorized the Commissioner to "revive an application if the delay is shown to the satisfaction of the Commissioner to have been "unavoidable." 35 U.S.C. §133 (1994).

The regulations at 37 C.F.R. §1.137(a) and (b) set forth the requirements for a petitioner to revive a previously unavoidably or unintentionally, respectively, abandoned application under this congressional grant of authority.

The language of 35 U.S.C. §133 and 37 C.F.R. §1.137(a) is clear, unambiguous, and without qualification: the delay in tendering the reply to the outstanding Office action, as well as filing the first petition seeking revival, must have been unavoidable for the reply now to be accepted on petition.²

² Therefore, by example, an unavoidable delay in the payment of the Filing Fee might occur if a reply is shipped by the US Postal Service, but due to catastrophic accident, the delivery is not made.

Delays in responding properly raise the question whether delays are unavoidable.³ Where there is a question whether the delay was unavoidable, Petitioners must meet the burden of establishing that the delay was unavoidable within the meaning of 35 U.S.C. §133 and 37 C.F.R. §1.137(a).⁴ And the Petitioner must be diligent in attending to the matter.⁵ Failure to do so does not constitute the care required under Pratt, and so cannot satisfy the test for diligence and due care.

(By contrast, unintentional delays are those that do not satisfy the very strict statutory and regulatory requirements of unavoidable delay, and also, by definition, are not intentional.⁶)

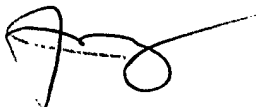
CONCLUSION

Petitioner has satisfied the regulatory requirements and the petition under 37 C.F.R. §1.137(b) hereby is **granted**.

Petitioner's brief, compliant with the regulations at 37 C.F.R. §1.192, is due within two (2) months of the date of this decision.

The instant application is forwarded to Technology Center 2800 to await the filing of Petitioner's Brief (with fee) on appeal.

Telephone inquiries concerning this decision may be directed to the undersigned at (703) 305-9199.



John J. Gillon, Jr.
Senior Attorney
Office of Petitions

³ See: *Changes to Patent Practice and Procedure; Final Rule Notice*, 62 Fed. Reg. at 53158-59 (October 10, 1997), 1203 Off. Gaz. Pat. Office at 86-87 (October 21, 1997).

⁴ See: *In re Application of G*, 11 USPQ2d 1378, 1380 (Comm'r Pats. 1989).

⁵ See: *Diligence in Filing Petitions to Revive and Petitions to Withdraw the Holding of Abandonment*, 1124 Off. Gaz. Pat. Office 33 (March 19, 1991). It was and is Petitioner's burden to exercise diligence in seeking either to have the holding of abandonment withdrawn or the application revived. See 1124 Off. Gaz. Pat. Office *supra*.

⁶ Therefore, by example, an unintentional delay in the reply might occur if the reply and transmittal form are to be prepared for shipment by the US Postal Service, but other pressing matters distract one's attention and the mail is not timely deposited for shipment.